



## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

[Docket No. FAA-2022- 1204]

#### Draft FAA Policy Regarding Air Carrier Incentive Program

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Proposed Policy; Request for Comments.

**SUMMARY:** This notice announces a proposed update of FAA policy regarding incentives offered by airport sponsors to air carriers for improved air service. It is longstanding practice for airport operators to offer incentives to air carriers to promote new air service at an airport, including both new air carriers serving the airport and new destinations served.

**DATES:** The FAA will accept public comments on the proposed policy statement for 60 days. Comments must be submitted on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The FAA will consider comments on the proposed policy statement. In response to comments received, the FAA will consider appropriate revisions to the policy and publish a subsequent policy statement in the Federal Register.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2022-1204 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov> and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.
- *Hand Delivery or Courier:* Bring comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- *Fax:* Fax comments to Docket Operations at 202-493-2251.

For more information on the process, see the **SUPPLEMENTARY INFORMATION** section of this document.

*Privacy:* In accordance with 5 U.S.C. 553(c), the Department of Transportation (DOT) solicits comments from the public to better inform its process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

*Docket:* To read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket. Or, go to the Docket Management Facility in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kevin C. Willis, Director, Office of Airport Compliance and Management Analysis, ACO, Federal Aviation Administration, 800 Independence Avenue, SW. Washington, DC 20591, telephone (202) 267-3085; facsimile: (202) 267-4629.

**SUPPLEMENTARY INFORMATION:** Airports obligated under the terms of an Airport Improvement Program grant agreement include virtually all commercial airports in the United States. At each of these airports, the airport sponsor must ensure that an air carrier incentive program is consistent with the sponsor's FAA grant agreements, including standard Grant Assurances relating to economic discrimination, reasonable fees, and use of airport revenue. In the 1999 *Policy and Procedures Regarding the Use of Airport Revenue*, the FAA provided that certain costs of activities promoting new air service and competition at an airport are permissible as a tool for commercial airports to establish or retain scheduled air service. In the 2010 *Air Carrier Incentive Program Guidebook*, the FAA provided more detailed guidance on both the use of airport revenue and the temporary reduction or waiver of airport fees as an incentive for

carriers to begin serving an airport or begin service on a route not currently served from the airport. A number of U.S. airport sponsors have used air carrier incentive programs in recent years, and the agency had the opportunity to review many of these programs for consistency with the sponsor's grant agreements, Grant Assurances, and other Federal obligations. Based on that experience, the FAA is proposing a restatement of agency policy on air carrier incentive programs. This notice publishes and requests public comment on the proposed revised policy statement.

#### AVAILABILITY OF DOCUMENTS:

You can get an electronic copy of this policy and all other documents in this docket using the Internet by:

(1) Searching the Federal eRulemaking portal (<http://www.faa.gov/regulations/search>);

(2) Visiting FAA's Regulations and Policies Web page at

([https://www.faa.gov/regulations\\_policies](https://www.faa.gov/regulations_policies); or

(3) Accessing the Government Printing Office's Web page at

(<https://www.gpoaccess.gov/index.html>.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Airport Compliance and Management Analysis, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3085. Make sure to identify the docket number, notice number, or amendment number of this proceeding.

#### AUTHORITY FOR THE POLICY:

This notice is published under the authority described in Title 49 of the United States Code, Subtitle VII, part B, chapter 471, section 47122(a). The policy proposed under this notice will not have the force and effect of law and is not meant to bind the public in any way, and the notice is intended only to provide information to the public regarding existing requirements under the law and agency policies. Mandatory terms such as "must" in this notice describe established statutory or regulatory requirements.

## BACKGROUND:

### Air Carrier Incentive Programs

Airports and communities of all sizes use air carrier incentives in order to attract new air service. Incentives may be offered to new entrant carriers to begin service at an airport or to incumbent carriers at an airport to add new routes. Incentives may apply to international or domestic service. Air carrier incentive programs (ACIP) can be divided into two primary categories: programs funded by the airport itself (“airport-sponsored incentives”) and those funded by the local community (“community-sponsored incentives”). The primary distinction between these two groups relates to the funding used for an incentive. For airport-sponsored incentives using airport funds, the use of the funds must comply with the requirements of Federal law and FAA grant agreements for use of airport revenue. In contrast, community-sponsored incentives using non-airport funds may be used in a broader set of ways. Community-sponsored incentives have been funded by various community groups, including local governments, local chambers of commerce and tourism organizations and local businesses. Airport-sponsored incentives largely involve a reduction or waiver of landing fees and other airport fees. Airport sponsors may also contribute to marketing programs, provided the marketing focuses on the airport rather than destination marketing. Community-sponsored incentives can include more direct financing of routes, including minimum revenue guarantees, travel banks, and marketing funding that may include destination marketing. Another important distinction is the role played by the airport sponsor. The sponsor may have a direct management role of the airport-sponsored incentive program, or a limited role advising the non-airport entity responsible for the community-sponsored incentive program.

### Federal obligations

Airport sponsors that have accepted grants under the Airport Improvement Program (AIP) have agreed to comply with certain Federal requirements included in each AIP grant agreement as sponsor assurances. The Airport and Airway Improvement Act of 1982 (AAIA) (Pub. L. 97-

248), as amended and recodified at 49 U.S.C. section 47101 *et seq.*, requires that the FAA obtain certain assurances from an airport sponsor as a condition of receiving an AIP grant. Several of these standard Grant Assurances relate to the extent to which an airport sponsor can provide incentives to an air carrier in return for new air service at the airport.

*Grant Assurance 22: Economic discrimination.* Grant Assurance 22, paragraph 22.a. requires the airport sponsor to allow access by aeronautical operators and services on reasonable terms and without unjust discrimination. Paragraph 22.e. of Grant Assurance 22 further requires:

Each air carrier using such airport ... shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non- signatory carriers.

The FAA has determined that a carrier starting new service at an airport is temporarily not similarly situated to carriers with established route service at the same airport. Accordingly, an airport sponsor may offer a waiver or reduction of fees and jointly market new service, for a fixed time and within certain limits, without unjustly discriminating against carriers not offering new service and not participating in the air carrier incentive program.

Grant Assurance 22 also serves to prohibit an airport sponsor from charging carriers and other operators not participating in an incentive program for any costs of an air carrier incentive program. Charging non-participating operators for the costs of an incentive would be a cross-subsidy of the incentive program, and therefore not a reasonable fee component for non-participating operators.

*Grant Assurance 24, Fee and Rental Structure:* Grant Assurance 24 generally requires that an airport sponsor maintain an airport rate structure that makes the airport as self-sustaining as possible. For purposes of planning and implementing an ACIP, the airport sponsor must assure

that a marketing program to promote increases in air passenger service does not adversely affect the airport's self-sustainability and the existing resources needed for the operation and maintenance of the airport.

*Grant Assurance 25, Airport Revenues:* Grant Assurance 25, which implements 49 U.S.C. section 47107(b), generally requires that airport revenues be used for the capital and operating costs of the airport or local airport system. Title 49 U.S.C. section 47133 imposes the same requirement directly on obligated airport sponsors. The FAA *Policy and Procedures Regarding the Use of Airport Revenue*, in section V.A.2, provides that expenditures for the promotion of an airport, promotion of new air service and competition at the airport, and marketing of airport services are legitimate costs of an airport's operation. Air carrier operations are not a capital or operating cost of an airport; therefore, use of airport revenue for a carrier's operations is a prohibited use of airport revenue. Accordingly, while an airport sponsor can assume certain marketing costs relating to service at the airport, the sponsor may not make payments in any form from airport revenue to a carrier for operating at the airport, including for providing air service at the airport.

### **Related Federal Programs**

*Essential Air Service Program.* Following deregulation of the airline industry, the Essential Air Service (EAS) program was put into place to guarantee that communities that were served by certificated air carriers before airline deregulation maintain a minimal level of scheduled air service. The United States Department of Transportation (the Department) implements this program by subsidizing at least a minimum of daily flights from each designated EAS community/airport, usually to a large- or medium-hub airport, except for within Alaska. As of late 2022, the Department subsidizes commuter and air carriers, and air taxis to serve 61 communities in Alaska and 111 communities in the 48 contiguous states and Puerto Rico that otherwise would not receive any passenger air transportation. Because the EAS program largely involves Federal payments to air carriers, the [EAS] program does not affect the responsibilities

of an airport sponsor for use of airport revenue or compliance with other AIP Grant Assurances. Eleven (11) communities receive funding, via grant agreements, through the Alternate Essential Air Service (AEAS) program. Those 11 communities obtain their own air service, currently all from a commuter air carrier, operating all flights as public charters under DOT Part 380 regulations.

*Small Community Air Service Development Program.* The Small Community Air Service Development Program (SCASDP) is a Federal grant program designed to provide financial assistance to small communities to help them enhance their air service. The program is managed by the Associate Director, Small Community Air Service Development Program, under the Office of Aviation Analysis, in the Office of the Secretary of Transportation. Grantees must be public entities and can include local governments and airport operators. Grant funds may be used for a variety of measures to promote air service and are dispersed on a reimbursable basis. SCASDP grant funds are not airport revenue and may be used for purposes for which airport revenue is prohibited, including direct subsidy of air carrier operations. Holding a SCASDP grant does not affect an airport sponsor's obligations under its AIP grant agreements. The Department's order awarding SCASDP grants states that a SCASDP grant does not relieve the airport sponsor from the obligation to use airport revenues only for purposes permitted by the AIP Grant Assurances and Federal law. Accordingly, if airport revenues are used as local match funds for a SCASDP grant, those funds remain subject to Grant Assurance 25, however this would not prevent an airport sponsor using airport revenue as a local match to SCASDP grants similar to airport revenue being used as a local match to AIP grants. This permits airport sponsors to pursue reasonable strategies to promote the airport and provide incentives to encourage new air service.

### **The 2010 Air Carrier Incentive Guidebook**

FAA policy on air carrier incentive programs is currently published in the *Air Carrier Incentive Program Guidebook*, issued in September 2010 (and referred to below as "the Guidebook" or

“the 2010 Guidebook”). The Guidebook is available on the FAA Airports web site at:

[https://www.faa.gov/airports/airport\\_compliance/media/air-carrier-incentive-2010.pdf](https://www.faa.gov/airports/airport_compliance/media/air-carrier-incentive-2010.pdf)

While the Guidebook has served as a useful description of FAA policy on ACIPs since 2010, the agency is considering a policy grounded more in basic principles rather than in a detailed list of prohibited practices. The intention is to provide more flexibility for airport sponsors to design particular incentive programs while remaining in compliance with Federal obligations regarding economic discrimination, reasonable fees, and use of airport revenue.

### **FAA Experience with ACIPs**

In the last 20 years, and particularly since the publication of the 2010 Guidebook, there has been a proliferation of ACIPs. ACIPs have been implemented at more than 250 U.S. commercial service airports. Some airport sponsors have used ACIPs on occasion or intermittently, while others have maintained ACIPs on a recurring and renewable annual basis. ACIPs have been used at smaller airports seeking to acquire and maintain any level of air carrier service, while sponsors of larger hub airports have also used ACIPs to add to existing service patterns.

While most ACIPs have complied with Federal obligations as outlined in the 2010 Guidebook, several practices have raised issues of compliance:

- There have been cases where an airport sponsor has sought service from a specific air carrier and tailored its ACIP for that purpose, which can present an issue of unjust discrimination.
- While sponsors have avoided direct cash subsidies to carriers, some ACIPs have included incentives that could be seen as efforts to circumvent the clear prohibition on the use of airport revenue for subsidy of carrier operations.
- Sponsors have made direct cash payments to carriers for marketing costs under a joint marketing program.



- Use of a sponsor's community funds for practices such as airline subsidies and revenue guarantees for a carrier may be inconsistent with the sponsor's Grant Assurances.
- Sponsors have entered into incentive arrangements with a carrier with no notice to the public or other carriers of the terms of the incentive program. Non-participating carriers may have no means of determining whether and how the incentive program affects aeronautical fees at the airport.

In consideration of agency experience with the oversight of ACIPs in recent years, the FAA is proposing a restatement of the agency policy on ACIPs.

### **Guiding General Principles**

The framework of Federal statutes and grant agreements in which an ACIP can be implemented can be summarized in five basic principles. The proposed restatement of policy on ACIPs includes a statement of each of these principles, as the agency interpretation of what Federal statutes and grant agreements allow. While the policy statement describes in more detail whether certain elements of an ACIP are acceptable, FAA determinations of whether an ACIP is consistent with Federal obligations will ultimately be based on application of the general principles. The proposed principles and the authorities on which they are based are as follows:

- *Discrimination between carriers participating in an ACIP and non-participating carriers must be justified and time-limited.* Grant Assurance 22 prohibits unjust discrimination among air carriers at an airport. Discrimination in the form of fee reductions for a participating carrier is only justified until the carrier has had a reasonable opportunity to market the new service. After that time the carrier is considered similarly situated to other carriers at the airport, and must operate under the same terms and fees as other carriers.
- *A sponsor may not use airport revenues to subsidize air carriers.* 49 U.S.C. section 47133 and Grant Assurance 25, *Airport Revenues*, prohibit use of airport revenue for purposes other than those listed in U.S.C. sections 47107(b) and 47133. Payments to

an air carrier to operate at an airport are not considered a capital or operating cost of the airport, and are prohibited by 49 U.S.C. sections 47107 and 47133, and Grant Assurance 25.

- *A sponsor may not cross-charge non-participating carriers or other aeronautical users to subsidize ACIP carriers.* Grant Assurance 22 requires that aeronautical fees be reasonable and not unjustly discriminatory. FAA policy on aeronautical fees, in the *Policy Regarding Airport Rates and Charges*, provides that the portion of allocated costs among aeronautical users, which includes air carriers, should not exceed an amount that reflects the proportionate aeronautical use. A carrier not participating in an ACIP may be charged an appropriate amount for its own proportionate use of the airport, but not any additional amount to cover the shortfall in total collections resulting from a fee reduction or waiver for a carrier participating in an ACIP. The same policy extends to other aeronautical users of the airport, such as general aviation tenants and operators.
- *The terms of an ACIP should be made public.* The *Policy Regarding Airport Rates and Charges* provides that airport sponsors should advise aeronautical users well in advance of a change in airport charges, and provide adequate information to permit aeronautical users to evaluate the change and the justification for the change. An ACIP that reduces or waives fees for a participating carrier is a change in airport fee methodology, and carriers and other aeronautical users of the airport should be advised of a proposed ACIP incentive in advance. While notice of an ACIP to airport users is not expressly required in the AIP Grant Assurances, the planning and implementation of an ACIP without notice to all eligible carriers substantially increases the likelihood that the incentives will be considered unjustly discriminatory. Similarly, adoption of an ACIP without notice to carriers and other aeronautical users at the airport, or the opportunity for those users to review the proposed ACIP terms, leaves the airport sponsor vulnerable to a complaint that the ACIP adversely affects the fees charged to non-participating users.

- *Use of airport funds for an incentive program must not adversely affect the resources needed for operation and maintenance of the airport.* As required by Grant Assurance 24, a sponsor adopting an ACIP must maintain a self-sustaining rate structure that continues to provide adequate funds for required operations and maintenance responsibilities, without increasing rates charged to non-participating operators or otherwise violating Grant Assurance 22.

### **Summary of key provisions:**

Federal law and standard Grant Assurance language affecting ACIPs have not changed since 2010, and FAA policy on ACIPs remains substantially the same as stated in the 2010 Guidebook. However, the FAA had the opportunity to review compliance with AIP Grant Assurances under the 2010 guidance, and to consider whether a revised policy statement could provide additional clarity in problem areas to prevent potential noncompliance. For this reason, the proposed policy differs to some extent from the 2010 guidance on certain elements of an ACIP. This could affect the planning and implementation of new ACIPs and the continuation of existing programs, and the agency is seeking industry and public comment on the proposed guidance.

In addition to the statement of general guiding principles, key provisions of the new policy that differ from the 2010 Guidebook are:

*Definition of new service.* The 2010 Guidebook defined new service as:

(a) service to an airport destination not currently served, (b) nonstop service where no nonstop service is currently offered, (c) new entrant carrier, and/or (d) increased frequency of flights to a specific destination.

The proposed policy defines new service as:

Any nonstop service to an airport destination not currently served with nonstop service, or any service to an airport by a new entrant carrier.

Only new nonstop service to a destination or any service by a new entrant carrier qualifies as new service for the purposes of the policy. Note that service is not considered new if any frequency of service is provided in that market, even if the existing service is less than 7 days a week. An increase in frequency to a destination already served, i.e., (d) of the current definition, therefore would no longer be considered new service, on the basis that such an increase would not justify incentives to a carrier offering only the increased frequency. The FAA particularly requests comments on how the proposed definition would affect existing and planned ACIPs.

*Seasonal service.* The 2010 Guidebook does not recognize repeated seasonal service as new service. Some airport sponsors in resort and similar destinations, with service offered only in certain months of the year, have commented to FAA that a carrier may not have sufficient time to market and develop passenger business in one season. Accordingly, the proposed policy defines seasonal service as service offered for less than 6 months a year. The proposed policy permits incentives for seasonal service for 3 seasons, up to 3 years from the start of the service.

*Aircraft size/upgauging.* The proposed policy would continue the general policy stated in the 2010 Guidebook prohibiting an incentive based on the type or size of aircraft. In 2011, the Clark County Department of Aviation petitioned the FAA to permit the County to implement an ACIP at Las Vegas McCarran Airport that would “induce increases in landed weight” of air carrier aircraft, or “upgauging.” The County requested that the agency’s definition of “new service” be amended to include “increases in landed weight.” The FAA granted the petition in part (77 FR 21146; April 9, 2012), with several conditions. A carrier receiving the incentive could not contract its schedule, to operate fewer flights with the larger aircraft or cancel other routes at the airport. Also, upgauging could not be the only incentive in the sponsor’s ACIP. The FAA requests comment on whether or not the proposed policy should be revised to exclude a conditional upgauging element similar to that allowed for Clark County in 2012.

*Air cargo incentives.* The policy clarifies that an ACIP may be offered for new cargo service, separate from any ACIP offered for new passenger service.

*Per Passenger and per seat-mile incentives.* Incentives offered for specific aircraft types or number of seats continues to be unacceptable, because they are so easily adapted to directing incentives to particular carriers at an airport. However, the FAA recognizes that incentives have been offered that are related to the number of passengers actually carried, which rewards the success of the new service, or the seat-miles of the new service, which rewards longer routes without limitation to particular destinations. The proposed policy would allow both kinds of incentives, although on condition that the incentives be structured to avoid unjust discrimination. Also, the resulting reduction in fees could not exceed the amount of the standard fees the carrier would have been charged without the incentive.

*Transparency.* The 2010 Guidebook stated that it was advisable for airport sponsors to consult with incumbent air carriers before initiating an incentive program, but not required. In practice, the FAA is aware that some airport sponsors have adopted an ACIP without disclosing the terms or even the existence of the ACIP to other carriers or airport users. Failure to consult with or even notify other carriers of an incentive provided to one carrier has the very real potential of unjust discrimination against carriers that would have been eligible for the incentive but were not advised of it. This discriminatory effect could apply to potential new entrant carriers not currently serving the airport as well as the airport's current tenant carriers. Failure to notify other carriers of an ACIP also raises a question of whether the incentives will adversely affect the rates of non-participating carriers, since there will be no independent review of the funding of the incentives. There are costs to an ACIP, including marketing costs and the replacement of standard fees that would have been paid by a participating carrier if that carrier were not receiving a fee reduction. An ACIP may not increase the rates charged non-participating carriers to cover these costs, since any increase would be a prohibited cross-subsidy of the carrier

receiving the incentive. If the terms of an ACIP are not disclosed to non-participating carriers, there may be no way for those carriers to determine whether their fees are affected by the ACIP.

Accordingly, the proposed policy includes stronger direction on disclosure of proposed ACIPs and incentives. Specifically, the FAA expects an airport sponsor:

- To disclose, as a core element of an acceptable ACIP, the availability and details of a planned ACIP to both incumbent carriers and the carrier industry, and to periodically post the incentives actually granted.
- To provide advance notice of the execution of an ACIP agreement.
- To issue the ACIP as a separate document, rather than as a provision in a participating carrier's lease and use agreement.
- To provide financial information on the costs and funding of an ACIP to all aeronautical users of the airport.

*Sponsor assistance to non-sponsor ACIPs.* The 2010 Guidebook effectively prohibited airport sponsor staff from assisting or advising a non-airport entity on an ACIP that used general community funds, not airport funds, and was not subject to the terms of the sponsor's AIP grant agreements. However, in many cities the airport staff is often the best source of expertise on the airport's air service needs and the airline industry in general. The FAA acknowledges that this prohibition was impractical and probably not observed in practice. Accordingly, the proposed policy would permit an airport sponsor to participate in the use of non-airport funds for an ACIP, with certain limitations:

- An airport sponsor may use general government funds (i.e., non-airport revenue) for uses that would be prohibited by Grant Assurance 25 for airport funds, including subsidy of air carrier operations. However, the sponsor would remain subject to Grant Assurance obligations for unjust discrimination in the use of the non-airport funds.

- A non-sponsor entity may use its funds for an ACIP without limitation by the airport sponsor's Grant Assurances, on two general conditions:
  - The funds may not be commingled with airport funds. If the non-airport entity's funds are added to an airport account, the funds will be considered airport revenues and subject to Grant Assurance 25.
  - The airport sponsor may provide technical advice on airport and air carrier matters to the non-airport entity, i.e., the local chamber of commerce, but may not participate in the entity's decision-making process on the use of the funds or the handling of funds. If airport sponsor staff take any responsibility for allocation of the funds, the use of the funds becomes subject to the sponsor's obligations under Grant Assurance 22, prohibiting unjust discrimination.

*Payments for marketing new service.* The 2010 Guidebook *recommended* that an airport sponsor pay marketing and advertising costs to the entity providing the market services, rather than to the carrier. However, on further reconsideration of this guidance as a recommendation only, the FAA has concluded that placing any airport funds at the disposal of a carrier is inconsistent with the prohibition on use of airport funds for a carrier subsidy. Payment to the carrier directly is also entirely unnecessary for an ACIP marketing program, since all acceptable services will normally be provided by a third-party contractor who can be paid directly by the sponsor as well as the carrier. Accordingly, the proposed policy makes clear, consistent with the revenue use statutes, that payments to a carrier will be considered a prohibited diversion of airport revenue, and allows payments of airport revenue for marketing only to the entity providing the marketing services.

*Limited budget for an ACIP.* The 2010 Guidebook made a distinction between small airports and larger airports, without defining the distinction. Small airports with a limited budget that would support incentives for only one carrier were encouraged to select the carrier through an RFP process, although not required to do so. Larger airports were advised to budget enough funds for

incentives to all interested carriers. The FAA recognizes that airports of all sizes may have reasons to limit the budget for an ACIP, and the proposed policy does not make a distinction among airports based on size. Similarly, the proposed policy no longer includes a preference for use of an RFP to select a carrier for incentives, since other processes can be acceptable.

However, to avoid undisclosed dealings with a favored carrier, for example, the FAA expects an airport sponsor implementing an ACIP limited to one carrier to publish information on the ACIP at least 30 days prior to entering into a carrier agreement for incentives.

*Restart of service.* As a result of the 2020-21 COVID 19 pandemic, air carriers canceled a number of U.S. routes due to the falloff in demand for air travel. Both air carriers and airport sponsors have since asked the FAA for guidance on the use of incentives for service that was subject to a prior ACIP but then cancelled during the pandemic. Since the circumstances can vary, the proposed policy leaves discretion to the airport sponsor on the use of incentives to restart service previously subject to an incentive but canceled. This provision is not to be used to extend an incentive beyond the limits otherwise applicable under the policy, however.

*Applicability to existing ACIPs.* The FAA recognizes that some ACIPs and carrier incentives are currently in effect based on guidance in the 2010 Guidebook, and that some terms of those ACIPs may not be consistent with the policy statement proposed in this Notice. Accordingly, carrier incentives initiated prior to the issuance date of this policy, under programs that complied with the FAA's previous policy guidance, would be permitted to continue as implemented until they expire. All such incentives will necessarily expire within 2 years of the issuance date of a final policy statement. Regardless of the terms of an existing ACIP, incentives initiated on or after the issuance date of the final policy must conform to the guidance in the final policy statement for compliance with sponsor Grant Assurances.

#### THE PROPOSED POLICY:

For the above reasons, the FAA is proposing the following statement of policy on air carrier incentive programs, to supersede the *Air Carrier Incentive Program Guidebook* issued in 2010.



## Air Carrier Incentive Programs

Many U.S. airport sponsors have found it beneficial to encourage new air service and new carriers at their airports by offering air carrier incentive programs (ACIPs), in the form of reductions or waivers of airport charges, and/or support for marketing new service.

ACIPs represent a limited exception to the general rule stated in Grant Assurance 22 paragraph 22.e., guaranteeing all carriers non-discriminatory and equivalent rates and charges for each carrier's category. FAA has reconciled this exception with the general rule on the understanding that a new carrier operating at an airport, or a carrier starting a new route, operates at a disadvantage with established carriers until the new service becomes known and accepted. In that sense, the carrier operating new service is not similarly situated to established carriers, and a sponsor may reduce charges to the new service carrier in some circumstances, for a limited time, without violating Grant Assurances 22, 23, 24, or 25.

In considering whether an ACIP complies with a sponsor's Federal grant agreements, the FAA will apply these general principles to the particular elements of the ACIP:

- *Discrimination between carriers participating in an ACIP and non-participating carriers must be justified and time-limited.* Differences in airport charges for carriers under an ACIP from those charged to other carriers at an airport must not be unjustly discriminatory. Differences in charges must be justified by differences in the carriers' costs of starting and marketing new service at the airport and must be temporary.
- *A sponsor may not use airport revenues to subsidize air carriers.* Using airport revenue for cash payments and other forms of subsidy for a carrier providing new service is considered revenue diversion and is therefore prohibited by grant agreements and Federal law.
- *A sponsor may not cross-charge non-participating carriers or other aeronautical users to subsidize ACIP carriers.* Carriers not participating in an ACIP may not be charged for

the costs of the ACIP or for airport costs left uncovered as a result of the reduction or waiver of charges for an ACIP carrier, unless all non-participating carriers agree.

- *The terms of an ACIP should be made public.* Publishing the intent to implement an ACIP, as well as information on how the ACIP is being used, ensures all eligible carriers are aware of the program, allows non-participating operators to review the potential effect of the ACIP on standard airport rates and charges, and minimizes the grounds for complaints of unjust discrimination.
- *Use of airport funds for an ACIP must not adversely affect airport operations or maintenance.* A sponsor adopting an ACIP must maintain a self-sustaining rate structure that continues to provide funds for necessary operations and maintenance responsibilities, without increasing rates charged to non-participating operators.

Guidance on particular program elements in this policy applies generally to each of those elements. For variations on those elements, or program elements not specifically addressed in this guidance, the above five principles will govern the agency's ultimate determination of whether a particular ACIP is consistent with the sponsor's AIP Grant Assurances.

### **Definitions**

- **New Service:** Any nonstop service to an airport destination not currently served with nonstop service, or any service to an airport by a new entrant carrier.
- **Seasonal Service:** Nonstop service that is offered for less than 6 months of the calendar year.
- **New Entrant Carrier:** An air carrier that was not previously providing any air service to an airport.
- **Incumbent Carrier:** An air carrier already actively providing service to an airport.
- **Preexisting service:** Service to any airport destination that is currently served nonstop.

**An ACIP may contain any of several elements that do not unjustly discriminate against non-participating carriers, consistent with Grant Assurances 22 and 23.**

I. New Service v. Preexisting Service.

- a. Limiting an incentive to new service is not in itself unjust discrimination.

Incentives for flights to a destination not currently served with nonstop service may be provided for up to two years.

- b. New seasonal services (to a destination not currently served) are allowed to receive incentives for 3 seasons of service, up to 3 years from the start of the incentive.

- c. Generally, new service incentives must be available to all carriers offering new service on the same basis but are subject to the distinctions permitted under Section II of this policy.

- i. However, an airport sponsor is allowed to restrict incentives for new service if they have a limited budget. An airport sponsor is allowed to restrict incentives to one carrier if they have disclosed to all carriers that they are limiting incentives to only the first air carrier that establishes new service.

- ii. Airport sponsors are expected to provide public notification of the availability of an ACIP and post their planned incentives, including any limits on availability, for a minimum of 30 days before signing a contract with a carrier.

II. New Entrant Carriers

- a. Incentives for a new entrant carrier on a route not currently served can be provided for up to two years.

- b. Incentives can be offered to new entrant carriers for providing service to a destination already flown with nonstop service, while excluding incumbent air

carriers. In that case, the new entrant incentives are limited to no more than one year. After one year, the new entrant would be considered an incumbent air carrier, and similarly situated to other carriers at the airport. This applies to new entrants providing seasonal service as well as those providing year-round service.

- c. Generally, new entrant incentives must be available to all new carriers on the same basis. The ACIP may not select one new entrant and deny the program to another new entrant.
  - i. However, if an airport sponsor has a limited budget and has disclosed to all carriers that they are restricting incentives to only the first new entrant that enters the market, then the airport sponsor is allowed to limit incentives to one carrier.
  - ii. Airport sponsors are expected to provide public notification of the availability of an ACIP and post their planned incentives, including any limits on availability, for a minimum of 30 days before signing a contract with a carrier.

### III. Service Frequency

- a. It is not unjustly discriminatory to offer different levels of incentives for different frequencies of service (i.e., daily vs less than daily). For example, incentives typically offered for 5 days a week service can be discounted 40% for 3 days a week service.

### IV. Cargo Carriers

- a. It is not unjustly discriminatory for incentives to distinguish between passenger and cargo carriers.

### V. Per-Passenger and Per-Seat Mile Incentives

- a. Incentives on a per passenger or per seat-mile basis are not inherently unjustly discriminatory, but the airport sponsor should ensure that the incentives offered

would not be considered a subsidy or would result in unjust discrimination against non-participating carriers.

- b. The total value of fee reductions offered as an incentive on a per passenger or per seat-mile basis cannot exceed the amount of the fees that otherwise would have been incurred by a carrier for its operations at the airport.

#### VI. Aircraft Type

- a. Incentives based on aircraft type are unjustly discriminatory because this could unreasonably exclude certain carriers that do not operate the type of aircraft identified. Incentives for upgauging, to the extent they are allowed, must be structured to avoid limitation to a particular aircraft type or types.

#### VII. Legacy v. Low-Cost Carriers

- a. Incentives cannot target carriers with particular types of business models (e.g., legacy, low-cost carriers), nor should they be designed for a preferred carrier.

#### VIII. ACIP Transparency

- a. The FAA expects airport sponsors to provide effective notification of the availability and implementation of ACIPs to both incumbent and potential new entrant carriers (e.g., posting on an airport sponsor's public website; notification to industry trade groups). Information posted for the public should include the incentives offered; the program eligibility criteria; identification of the targeted or desired new service; and for incentives awarded, a periodic listing of all carriers benefiting from the ACIP, the incentives received, and identification of the incentivized service.
- b. An airport sponsor is expected to provide effective public notice of an ACIP at least 30 days before signing an agreement with a carrier to implement an incentive.

- c. To ensure transparency, an ACIP agreement should be a standalone document, consistent with the published ACIP information, and not embedded with any other agreement the airport sponsor and the carrier may enter into, such as a lease or operating agreement.
- d. Airport sponsors should make information on funding for any ACIP available to all aeronautical users at the airport, and sponsors should be ready to provide the necessary financial documentation to demonstrate that there is no cross-charging and that the program has no effect on rates and charges of other aeronautical users.

**An ACIP may not include direct or indirect subsidies of air carriers, as prohibited by 49 U.S.C. 47133 and 49 U.S.C. 47107, and Grant Assurance 25.**

I. Incentives v. Subsidies

- a. A subsidy occurs when airport funds flow, under all circumstances or conditionally, to a carrier with no goods or services being provided to the airport in return. For this purpose, air service is not considered a “service” provided to the airport. Any incentives where airport funds or assets (e.g., fuel) are transferred to a carrier, directly or indirectly (e.g., revenue or loan guarantees) would be regarded as prohibited subsidies.
- b. A waiver of costs that an airport sponsor would otherwise charge a carrier (e.g., landing fees or terminal rents) is not considered a subsidy, if for a limited duration consistent with the policies above. However, a waiver or assumption of costs that would normally be charged by a third party (ground handling, fuel, etc.) would be considered a subsidy and is not permissible for an ACIP. Incentives tied to specific customer service metrics (on-time performance, luggage delivery, etc.) are also not permissible.

II. Airport v. Non-Airport Revenues and Application to Subsidies and Other Revenue Guarantees

- a. Airport sponsors are prohibited from using airport funds to subsidize air carrier operations.
- b. A sponsor local government may use non-airport funds for subsidies and other uses that would be prohibited if airport funds were used. However, any use of funds would still need to meet Grant Assurance obligations prohibiting unjust discrimination.
- c. Local governments and community organizations not party to an AIP grant agreement, however, can use non-airport funds for incentives that would not be permissible for an obligated airport sponsor, including directing incentives toward a specific carrier and using their non-airport funds for revenue guarantees.
  - i. If a local government or community organization chooses to fund a program to support new air service using non-airport funds, those funds may not be commingled with airport funds. Any funds placed in an airport's account are treated as airport revenues. As long as community incentives are kept separate from airport funds, the community organization's funding would not be considered airport revenue and therefore not subject to its special requirements.
  - ii. Airport staff can provide technical assistance to non-airport entities regarding ACIPs that do not use airport revenue, where the non-airport entity, and not the airport sponsor, is the agency responsible for decisions on expenditure of the funds. The role of airport staff can be advisory, but the airport staff cannot be involved in the decision-making process or handle non-airport funds. The airport staff's assistance may include:
    - 1. Guidance on the economic viability of prospective markets

2. Understanding of carrier business models and aircraft performance characteristics
3. Information on the availability of the airport sponsor's ACIP to support the new service within the limits described in this policy.

### III. Marketing Incentives

- a. Airport sponsors are permitted to contribute to the marketing of new service, but funds must flow directly to the marketing provider; transferring funds to a carrier is considered a prohibited subsidy.
- b. A marketing program must promote use of the airport. Use of airport funds for general economic development or for marketing and promotional activities unrelated to the airport is prohibited by 49 U.S.C. § 47107(k)(2)(B).

### IV. Incentives for Individual Travelers

- a. Airport sponsors are prohibited from offering cash incentives to travelers for flying a route, as this indirectly subsidizes the carrier serving that route.
- b. However, airport sponsors are allowed to offer coupons for food, parking or other benefits tied to general use of the airport, as long as the benefit is not restricted to passengers who fly a specific carrier or route.

**An ACIP may not result in an increase in charges for non-participating carriers or other aeronautical users of the airport.**

- I. An ACIP may not increase fees charged to non-participating carriers or other aeronautical users and tenants of the airport subject to the requirement for reasonable fees under 49 U.S.C. 47107(a)(1) and Grant Assurance 22.
  - a. The costs of an ACIP may not be passed on to non-participating carriers or other aeronautical users in any form. The costs of an ACIP include direct costs, such as marketing, and the general costs of airport operation and maintenance that are not covered by the carrier in an ACIP as a result of a reduction or waiver of fees.



- b. An acceptable ACIP will not result in an increase in the sponsor charges to non-participating carriers, i.e., on the charges that carriers would have paid in the absence of the incentivized service.
- c. For an airport sponsor with a residual fee methodology, an ACIP may not reduce the residual payment to non-participating carriers each year.

**An ACIP may not adversely affect an airport's self-sustaining rate structure, as required by Grant Assurance 24.**

- I. An ACIP must be funded from a source that not only does not increase rates for non-participating parties, but also does not involve the use of funds necessary for the proper operation and maintenance of the airport.

**FAA Oversight/Administration**

- I. Restart of Previous Service
  - a. Airport sponsors can use their own discretion when choosing whether to offer incentives for a carrier to re-start service that the same carrier had offered previously but cancelled either due to significant external circumstances (e.g., an extreme natural, manmade, or public health crisis, such as hurricanes, terrorism, pandemic) or poor route performance in past years.
  - b. In any event, discretion for service re-start may not be used to extend an incentive beyond the limits provided in this policy.
- II. FAA Review
  - a. At an airport sponsor's request, the FAA will review an ACIP for compliance with the sponsor's Federal obligations. The FAA does not approve ACIPs.
- III. Existing Incentives
  - a. Existing carrier incentives initiated prior to the issuance date of this policy, under programs that complied with the FAA's previous policy guidance, may continue as implemented until they expire. All such incentives will expire within 2 years of the

issuance date of this policy statement. Incentives provided on or after the issuance date of this policy must conform to the guidance in this policy statement.

Issued in Washington, DC.

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